number, therefore, because it provides the maximum number of available channels without requiring the Commission to revise its method of selecting licensees.

Secondarily, the licensing of four providers will assure intra-service competition, consistent with the evidence on the minimum size a satellite DARS system needs to be viable. While satellite DARS systems will vie for audience with CDs ($8.5 billion in annual revenues) and cassettes ($3 billion in annual revenues), the FCC can and should preserve the possibility of four satellite DARS systems where, as here, each of the four applicants has publicly stated that they can share the spectrum or has asked for less than one quarter of the 50 MHz allocated for the service. Four systems assures ample intra-service competition: no single licensee could distort or disrupt this new mode of audio entertainment.

Also, creating four satellite DARS systems -- each with 30-40 channels -- will increase diversity of audio offerings. Individually, each applicant has ample incentive not to duplicate formats within its own system. Unlike local radio stations, each satellite radio licensee will tend not to offer multiple channels of the same type of programming in order to avoid eating into its own market share; instead, they will seek to offer as many different narrow formats as possible.[27] Moreover, by maintaining the possibility of four satellite DARS licensees the FCC will maximize diversity because each licensee will have compelling market-based incentives to differentiate its offerings from the other licensees.[28]

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[27] *See infra* at note 107.

[28] *Cf.* "Hundt: Radio Is Strong," *Radio World*, August 23, 1995 at 1 ("The normal workings of the market are going to give you many benefits, economic growth, job growth, diversity of programming . . . .").

To preserve intra-service competition and overall satellite DARS diversity of programming, the Commission should insist that slots for four licensees remain in the spectrum indefinitely. Thus, if a licensee fails to implement its proposal -- for example, by failing to meet required milestones -- the newly vacated license should be made available so as to preserve the possibility of a fourth satellite DARS system.[29] Such a license could be assigned by competitive bidding, if otherwise lawful.

For similar reasons, CD Radio believes that licensees should not be permitted to acquire spectrum from other DARS licensees.[30] Rules and policies that allow aggregation would encourage an evolution toward a smaller number of satellite DARS systems than the available spectrum will support, *i.e.*, four, as shown above. Such a development would have serious anticompetitive repercussions. A single combination of two DARS systems would give one licensee control of half of the spectrum and automatically put the other two licensees at a serious competitive disadvantage. As a result, the remaining two systems would have no practical choice but to combine themselves. The remaining duopoly would mean not only a fifty percent reduction in the diversity of programming sources but potentially a lessening of price competition.[31]

While it is true that the FCC has imposed no explicit restraints on aggregation in DBS, that service exists in a materially different environment. In *Directsat Corporation*, the

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[29] In its original proposed rules, CD Radio suggested that, if a licensee fails for whatever reason, the spectrum should be re-divided among the remaining licensees.

[30] *Cf. NPRM*, ¶ 80.

[31] In addition, the prospects for a DARS monopoly would loom on the horizon.

FCC recently authorized the first aggregation of DBS permittees.[32] The Commission noted that even after EchoStar Communications, a DBS permittee, acquired control of Directsat, another DBS permittee, there would remain eight independent DBS permittees.[33] This is almost three times as many permittees as the number of DARS systems that would remain after a *single* combination of DARS licensees.[34] Moreover, the combined DBS operation in *Directsat Corporation* was to carry only 22 video transponders, less than the number planned by several of the other DBS permittees.[35] In contrast, as indicated by the pending DARS systems proposals, a combination of any two DARS systems could -- satellite economics permitting -- deploy approximately twice as many channels as the other two licensees, putting the two smaller competitors at a distinct disadvantage.

In addition, aggregation of DARS systems would simply be inequitable, both to other DARS licensees and parties that may become interested in entering the DARS market. If an applicant proves to be financially or technically incapable of constructing and launching its satellites, or unable to compete in the marketplace, other applicants should not face the inequitable prospect of a combined rival with twice as much spectrum and potentially double the channels. Simply put, such "spectrum warehouse" mergers would be driven by the prospect of a perverse regulatory "windfall" rather than by economics or the marketplace.

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[32] Directsat Corporation, 10 F.C.C. Rcd 88 (1995).

[33] *Id.* at 89.

[34] The FCC noted in *Directsat Corporation* that, at some level, undue concentration that would raise anticompetitive concerns in the DBS environment was a distinct possibility. *Id.* Certainly, marketplace concentration of just two or three DARS licensees resulting from one or two aggregations would raise such anticompetitive concerns.

[35] *Id.*

Further, aggregation would significantly diminish the chances for prospective entrants. Rather than pave the way for concentration, the FCC should give new parties the opportunity to apply for the spectrum abandoned by any failed applicants in a "second round" of licensing and acquire spectrum that would otherwise lay fallow. Permitting spectrum aggregation, by contrast, virtually ensures that no additional satellite DARS licenses could be issued, by auction or otherwise, after the initial round.

In sum, the Commission should license the four applicants, if qualified, and preserve the possibility of four satellite DARS systems -- a number sufficient to ensure competition and diversity of programming.[36]

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To gain acceptance in the marketplace, each satellite DARS applicant must win half a billion dollars in financing from Wall Street, convince cost-sensitive consumers to purchase equipment for their cars, and then vie for audience with numerous alternative audio services. Given this environment, licensing approaches that impose undue constraints on satellite DARS are likely to undercut the service before it has attracted a single listener. As set forth above, the Commission should license the allocated amount of spectrum to four qualified applicants putting to productive use the full 50 MHz allocated by assigning each provider 12.5 MHz.[37] Moreover, to ensure continued competition, the agency should insist on four

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[36] Appendix E hereto adds proposed 47 C.F.R. § 25.214(b)(6) to reflect this recommendation.

[37] Appendix E hereto includes a recommended rewrite of the *NPRM*'s proposed rules governing band segments and frequency assignments, 47 C.F.R. § 25.214(b)(2-3).

"slots" which could be assigned to qualified applicants, which -- if unused -- would be auctioned to new entrants.

III. THE COMMISSION CANNOT LEGALLY RE-OPEN THE SATELLITE DARS CUT-OFF OR AUCTION SATELLITE DARS SPECTRUM

The Commission has proposed three possible license eligibility options: Under option one, the spectrum would be divided equally among the four existing applicants, if otherwise qualified. Assuming all four of the pending applicants are qualified, each would be awarded a 12.5 MHz license,[38] which as shown above is the optimal amount of spectrum for a satellite DARS system.[39] Under option two, the FCC would license less than the total available spectrum to the four existing applicants and open the remainder to new applicants. If these new applicants were mutually exclusive, the license assignments would be made by auction. Under this option, the spectrum designated for the current four applicants would still be divided equally, but the band segments ultimately licensed to each would be less than 10 MHz.[40] Under its third option, the Commission would accept new applications, and if these applications were mutually exclusive the license assignments would be auctioned.[41]

Of all of these licensing schemes, option one is the only scheme that is legal, equitable and represents sound public policy. Options two and three are unlawful, inequitable and poor policy: unlawful because they vitiate the already-held cut-off and

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[38] *NPRM*, ¶ 33.

[39] *See* Section II *supra*.

[40] *NPRM*, ¶ 36.

[41] *Id.*, ¶ 37.

contravene the express limits of the auction statute; inequitable because they work a severe retroactive harm on applicants, such as CD Radio, which has spent five years and over $15 million literally creating satellite DARS based on the reasonable belief that the FCC would honor its own cut-off; and poor public policy because these approaches cast to the wind the hard work and resources expended in bringing satellite DARS to fruition and eliminating mutual exclusivity.

A. Options Two and Three Illegally Vitiate Already Established Cut-Offs

On September 13, 1992 -- nearly two and one half years after CD Radio filed its application -- the agency established December 15, 1992, as the date to file applications for satellite DARS services.[42] By that time, an appropriate frequency band had been found, and allocated to the United States by WARC-92. In December 1992, five other interested parties made the business decision to join CD Radio in attempting to provide this new technology.

Cut-offs are not some inconsequential creation, susceptible to being ignored at the agency's whim. Rather, they were devised in response to the landmark *Ashbacker* decision, where the Supreme Court required consolidated consideration of all competing license applications: "[I]f the grant of one [license] effectively precludes the other, the statutory right to a hearing . . . becomes an empty thing."[43] In the half-century since that decision, the FCC -- and other administrative agencies -- have adhered to this requirement by giving notice requiring interested parties to file for a license by a date certain in order to receive

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[42] *Id.*, ¶ 6-7.

[43] Ashbacker Radio v. FCC, 326 U.S. 327, 330 (1945).

consolidated consideration. Cut-offs were thus established in order to protect the due process rights of licensees and to ensure a fair and orderly administrative process.

Since *Ashbacker,* agencies and courts consistently have found application cut-offs to be an expedient yet fair method of license allocation. In *City of Angels Broadcasting, Inc. v. FCC*,[44] the District of Columbia Circuit observed that:

> [t]he cut-off rule basically serves two purposes. First, it advances the interest of administrative finality. . . Second, it aids timely broadcast applicants by granting them a 'protected status' that allows them to prepare for what often will be an expensive and time consuming contest, fully aware of the competitors they will be facing.[45]

The importance of cut-offs to putative licensees also has been recognized by the Commission itself on many prior occasions.[46] Indeed, in the very context of satellite DARS, the Commission has rightly acknowledged that "[t]he purpose of cut-off rules is to protect other applicants in the relevant proceeding."[47]

For fifty years since December 3, 1945, this approach has been unquestioned, at least until now. By suggesting a re-opening of the cut-off on its own motion, the Commission would make a mockery of its process and overturn the rights of existing applicants. This is

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[44] 745 F.2d 656, 663 (D.C. Cir. 1984) (quoting Ranger v. FCC, 294 F.2d 240, 243 (D.C. Cir. 1961)).

[45] *See also* James River Broadcasting Corp. v. FCC, 399 F.2d 581, 584 (DC. Cir. 1968) ("One of the policies underlying the cut-off rule is indeed the protection of potential applicants").

[46] *See, e.g.*, Sacramento Community Radio, Inc., 8 F.C.C. Rcd 4067, 4068 (1993) (cut-off designed to advance interests of administrative finality and to provide applicants with protected status in order to prepare for competitors they will face in the process).

[47] Request For Declaratory Ruling Filed By Satellite CD Radio, 9 F.C.C. Rcd 2569, 2571 (1994).

particularly true because no other entity has paid its filing fees and filed a satellite DARS application, rendering the Commission's proposal quite speculative. But, even if some new applicant were to appear, re-opening the cut-off -- or artificially limiting the amount of spectrum licensed in this processing round -- would be both illegal and inequitable.

1. Re-opening the Cut-off is Unlawful

Accepting new applications to be processed with the four pending requests would run counter to a half century of agency precedent abrogating cut-offs only "in 'extreme cases involving extraordinary circumstances,' and only when the untimely applicant has demonstrated that it acted with reasonable diligence and thus that its tardiness was attributable to circumstances beyond its control."[48] Simply put, the "protected status" that applicants enjoy would be eviscerated by any re-opening of the filing window. In fact, cut-offs have been re-opened only under the narrowest of circumstances, none of which is present here.

First, cut-offs have been waived where an applicant filed a timely request for a waiver of the cut-off. In *Denton Channel Two Foundation Inc.*,[49] a citizen's group filed for a timely waiver of a cut-off for broadcast licenses. The fact that the waiver request was timely filed, combined with the fact that the request was not ruled upon by the Commission

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[48] Florida Institute of Technology v. FCC, 952 F.2d 549, 553 (D.C. Cir. 1992) (citations omitted). *See also* Coalition For The Preservation of Hispanic Broadcasting v. FCC, 893 F.2d 1349, 1360 (D.C. Cir. 1990) (same), *rev'd on other grounds*, 931 F.2d 73 (D.C. Cir. 1991) (en banc).

[49] 85 F.C.C.2d 983 (1981).

for over two years, created "unique circumstances" under which the cut-off was extended.[50] Here, however, no requests have been filed for waiver; nor has another applicant even emerged. Therefore, by its own terms, this exception does not apply to this proceeding.

Second, additional applications will be permitted where the public notice of the cut-off was in some manner defective. In *Maxcell Telecom Plus v. FCC*,[51] the Commission "failed to provide sufficient notice to [a cellular licensee] of the scope of the cut-off procedure." Therefore, the FCC was ordered to reinstate the licensee's application, *nunc pro tunc* to its date of filing. Similarly, in *Way of Life Television Network v. FCC*,[52] the Commission failed to publish notice of the cut-off in the Federal Register, as required by law. Again, the Commission was required to extend the cut-off date for the benefit of those licensees that failed to receive actual notice of the cut-off.[53] In this proceeding, no party has asserted -- nor can they -- that public notice of the December 15, 1992, cut-off was inadequate.

Third, in some cases, the Commission has failed to follow its own precedent regarding cut-offs, or such precedent was unclear. So, for example, in *Green Country Mobilephone, Inc. v. FCC*,[54] the Commission refused to accept an application for a cellular license after the 5:30 p.m. filing deadline, after having made a pattern of doing so in the

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[50] *Id.* at 985.

[51] 815 F.2d 1551, 1560 (D.C. Cir. 1987).

[52] 593 F.2d 1356 (D.C. Cir. 1979).

[53] *See also* Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985) ("[T]he *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements."); Ridge Radio Corp. v. FCC, 292 F.2d 770 (D.C. Cir. 1961) (notice did not give adequate information as to which frequencies were being cut-off).

[54] 765 F.2d 235 (D.C. Cir. 1985).

past. In directing the FCC to accept the application, the court held that an agency cannot "arbitrarily waive[] a deadline in one case but not in another."[55] In both *Radio Athens, Inc. (WATH) v. FCC*,[56] and *Dudley Station Corp.*,[57] the Commission was ordered to waive the cut-off regarding the date of the application cut-off due in part to the ambiguity. In the instant proceeding, however, there is neither inconsistency of Commission action nor ambiguity of the pertinent rules.

Fourth, an act of God that prevents a party from filing will, on occasion, give grounds to re-open the cut-off. For example, in *Emerald Broadcasting Co.*,[58] an unusually heavy snow prevented a licensee from making the ground contour measurements necessary to complete his license application, while in *Fidelity Broadcasting Corp.*,[59] the fee office at the FCC was locked prior to the 5:30 p.m. filing deadline, preventing a licensee from filing his application. But none of those plagues has been visited upon this proceeding; on the cut-off date of December 15, 1992, the weather was clear and the Commission was open for business.

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[55] *Id.* at 238.

[56] 401 F.2d 398 (D.C. Cir. 1968).

[57] 18 F.C.C.2d 898 (1969).

[58] 8 F.C.C.2d 443 (1967).

[59] 26 F.C.C.2d 93 (1970).

Fifth, amendments to applications that are not considered major amendments (*e.g.*, resolving interference problems[60] or making minor ownership changes) may be filed after the cut-off date. For example, in *James River Broadcasting Corp. v. FCC*,[61] the court held that "[a]ny post-cut-off date amendments which do not require a new file number will be deemed not to have destroyed the substantial completeness of the [AM broadcast] application, *i.e.*, not to have created a change which would significantly upset the Commission's comparative processing of the applications."[62] In this case, no licensee is proposing to amend an *existing* application. Rather, the Commission itself is proposing to re-open the entire application process. As such, the proposal clearly falls outside this exception.

Finally, in the past, cut-offs have been waived in a few truly extraordinary circumstances. For instance, in *Alabama Citizens For Responsive Public Television*,[63] a cut-off was waived for applications for noncommercial educational television licenses under

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[60] Natick Broadcast Associates Inc. v. FCC, 358 F.2d 985 (D.C. Cir. 1967) (because field intensity measurements are more reliable than theoretical values, under 47 C.F.R. § 73.152, amendment is permissible to resolve frequency conflicts); Radio Antilles, 20 F.C.C. 2d 250 (1969) (same). *See also* 47 C.F.R. § 25.116(c)(1) (permitting amendments to satellite applications that resolve frequency conflicts).

[61] 399 F.2d 581, 584 (D.C. Cir. 1968).

[62] *See also* North American Broadcasting, Inc., 14 F.C.C.2d 617 (1968) (same); Howard L. Burris, 27 F.C.C.2d 190 (1971) (same); Earl Lamar Clark, 36 Rad. Reg. 2d 1666 (1976) (under 47 C.F.R. § 1.573(a)(1) (now § 73.3573), certain changes to FM transmitter location do not require new file numbers (citing *James River*)); Midcom Corp., 63 F.C.C.2d 257 (1977) (same (citing *James River* and *Clark*)); Empire Communications Co., 33 F.C.C.2d 731 (1972) (changing ownership information is not a major amendment to a paging application within the meaning of 47 C.F.R. §§ 21.23(c), (d)); Belo Broadcasting Corp., 44 F.C.C.2d 534 (1973) (applicant for TV station construction permit allowed to amend application to reflect transfer of control).

[63] 53 F.C.C.2d 457 (1975).

"unusual and compelling" circumstances. There, an inexperienced but otherwise diligent public interest group missed the cut-off trying to determine which of nine available channels to apply for. Similarly, in *Southeast Texas Broadcasting Co.*,[64] the prospective assignee of a financially strapped radio station was allowed an extra 60 days to file for a license.[65] Again, this proceeding presents none of the aforementioned extraordinary circumstances: three years, not just a few weeks, have gone by since this cutoff, rendering any hypothetical new applicant incapable of showing good cause or due diligence.

None of the existing exceptions to the cut-off rule applies. Moreover, the case law indicates that the limited exceptions to cut-offs are rooted in unique facts rather than new policy proclamations of the sort proposed in the *NPRM*. And in none of these decisions did the agency willy-nilly re-open an already closed cut-off for all comers. Hence, any Commission action to seek additional applications would be legally infirm. Rather than violate *Ashbacker* and half a century of its teachings, the FCC should promptly grant licenses to the existing applicants.

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[64] 5 F.C.C.2d 596 (1966).

[65] *See also* Fine Music, Inc., 6 F.C.C.2d 186 (1966) (although an application was accepted after the cut-off, it was not in conflict with any existing applications).

2. Re-opening the Cut-off is Inequitable and Poor Public Policy

In addition to being unlawful, re-opening the cut-off is bad public policy. Until the cut-off, potential licensees cannot predict the quality or the nature of the competition they will face. For this reason, CD Radio invested resources cautiously until the contours of the business landscape became more certain. As December 15, 1992, passed, however, and six parties filed license applications, business calculations and assessments were able to be made. Knowing the number, strengths, and weaknesses of the competing applicants, CD Radio finalized business plans, solicited capital and worked on system design. Its "protected status" gave it the incentive to resolve allocation and mutual exclusivity questions, develop service rules, and rebut the protectionist arguments of the existing radio broadcasters.

Re-opening the cut-off for new applicants vitiates these efforts. As a matter of equity, CD Radio should be compensated -- rather than punished -- for having invested five and a half years of labor and more than $15 million in single-handedly transforming satellite DARS from an interesting idea into a viable competitive service. These expenditures have produced a number of design, engineering, business, and regulatory breakthroughs that make satellite DARS what it is today:

- ***Development of the world's smallest satellite dish***
  In order to meet the size and cost considerations for mobile satellite DARS, CD Radio incurred substantial expense developing its now world famous "silver dollar" sized antenna. Development of this planar array antenna (with radius less than 1" and measuring approximately 0.1" thick) required CD Radio to expend significant sums on intensive research and design efforts since 1990.

- ***Advanced satellite system design***
  CD Radio devoted years of time and money to perfecting a satellite spatial and frequency diversity design that reduces the effects of multipath fading, frequency-

selective fading, and certain types of blockage thereby allowing for improved coverage throughout the CONUS.

- ***First advanced mobile satellite DARS receiver***
  CD Radio spent a great deal of time and money to ensure that the user interface to its system was functional as well as easy to use. The resulting operational satellite DARS receiver blends the technology needed to decode satellite DARS signals (including the dual channel reception/amplification/down conversion, multiplexing and PAC/digital to analog decoding) with conventional automobile radio features.

- ***Testing and refinement of system***
  CD Radio has confirmed the validity of its technical advances empirically through field trials. First, in 1991, CD Radio assembled and tested a satellite DARS system which transmitted CD-quality music via commercial C-Band satellite transponder capacity to a small custom-designed antenna. Later, CD Radio's 1993-95 "real world" tests in the S-Band required CD Radio to design and build a new smaller generation of antenna, embed the antenna in a vehicle, design and construct a prototype receiver, and deploy transmitters at a number of locations throughout the geographic test area.

- ***Compressing digital data with perceptual audio coding***
  In order to use the spectrum available for satellite DARS in the most efficient manner, CD Radio worked jointly with AT&T-Bell Laboratories to incorporate a highly sophisticated technique for compressing audio signals into a satellite DARS environment -- "perceptual audio coding."

- ***Participation in regulatory process***
  In addition to its key technical contributions in furtherance of satellite DARS, CD Radio spearheaded the administrative and regulatory processes that found and cleared spectrum in the S-Band for satellite DARS, both nationally and internationally. It has actively participated in the ITU-R 10/11-S, 2/2 and CITEL.

- ***Contractual arrangements for spacecraft construction***
  CD Radio has contracted with Space Systems/Loral for the construction of its satellite system. CD Radio estimates the cost of construction of these satellites at approximately $225 million.[66]

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[66] The potential expense of contracting for the spacecraft is significantly greater. In narrowing the field of satellite DARS applicants to four (an action that CD Radio undertook to eliminate mutual exclusivity), CD Radio removed Loral from the field by entering into a spacecraft construction contract that contained an escalation clause under which the costs of construction increase every day after February 1993. To date, this escalation in cost -- caused primarily by broadcasters -- has made CD Radio's construction costs rise by more

- ***Multiple nationwide focus groups***
  CD Radio has conducted several nationwide focus groups in order to study and understand satellite DARS.

- ***Automaker and radio receiver manufacturers***
  CD Radio has held discussions with virtually every automaker in the world and numerous radio manufacturers about integrating the satellite band into their products.

- ***Capital raising***
  CD Radio has pioneered capital raising in a difficult regulatory environment, providing an innovative model for future high technology ventures.

- ***Business planning***
  CD Radio, with the assistance of market researchers and financial analysts, has developed its business plan, which it used to initiate and shape satellite DARS as we know it today.

Moreover, acting in reliance on the finality of the cut-off, CD Radio and the other applicants have worked assiduously to solve allocation and international coordination problems, and develop a spectrum sharing plan that eliminates mutual exclusivity, thus making the Commission's job easier. Re-opening the cut off here would waste this effort, to the detriment of the existing applicants and also the listening public, who would suffer a further delay in service. More importantly, it sends a chilling message to future entrepreneurs and the capital markets.

Plainly, the existing applicants have created value by enhancing significantly the prospects for satellite DARS. Because of the applicants' efforts, other parties may now be interested in applying to provide such service. However, that does not justify re-opening the cut-off. Just the opposite. Such an action would remove any incentive for proponents of future new services to free up spectrum, resolve spectrum usage conflicts, and create

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than $20 million. Hence, while CD Radio's investors are $15 million out of pocket to date, the total cost is actually $35 million.

valuable services. Why should applicants undertake private resolution of such thorny issues when the Commission may accept additional "free rider" applications not part of the negotiated spectrum use plan?[67]

Re-opening the cut-off also is ill advised from the perspective of spectrum usage. As described above, DARS licensees require an amount of spectrum sufficient (*i.e.*, 12.5 MHz to offer a diversity of services on a cost-efficient basis. Each provider needs enough spectrum to offer enough choices in programming to appeal to multiple niche audiences (*e.g.*, Children's and Chinese language programming). If licensees are shorted spectrum, it is the niche services that will suffer, making satellite DARS more similar to conventional radio.

For this reason alone, the Commission's option two should be rejected. But, even beyond the threat to audio diversity, artificially limiting the amount of spectrum licensed to the cut-off applicants simply makes no sense. The entire 2310-2360 MHz band has been allocated; the Commission has already rejected the very core of the second option. As noted above, the satellite DARS *Report and Order* allocating the S-Band spectrum declined to adopt a proposal to split the spectrum in half, and reserve some for later licensing, finding that "no purpose would be served in imposing a limit on the use of the DARS allocation at this

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[67] Moreover, canceling the cut-off signals to all interested parties that the administrative process is quixotic and capable of working great mischief on putatively settled business plans in other areas of the communications and broadcasting industry. Indeed, why should potential new applicants or the capital markets believe that the Commission will treat them any more fairly than the existing applicants?

time."[68] It is beyond belief that the agency could, in less than six months, propose such an abrupt reversal of course without any supporting explanation.

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In sum, license application cut-offs were designed in large part to give applicants assurance that at some point in the application process they assess the quantity and nature of the competition and calibrate their business decisions accordingly. Given the tremendous amount of time and resources expended throughout the pending process, cut-offs are only waived under the most unusual of circumstances, none of which is present in this proceeding. Therefore, options two and three must be rejected.

The apparent source of the recommendation to re-open the cut off -- existing broadcasters, fearful of competition -- underlies the obvious fact that this approach will only further delay consumer access to satellite DARS. Specifically, re-opening the cut-off would delay licensing (that already has consumed nearly five and half years) while a second cut-off was held and other applications were filed. It also would create delay because, understandably, all four existing applicants would immediately appeal the decision, and prevail. The delivery of satellite DARS to the American public would be years away. While this may be the goal of broadcasters, the Commission should not allow it to happen.

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[68] 10 F.C.C. Rcd at 2315.

B. Satellite DARS Auctions Are Illegal, Unfair and Poor Policy

1. The Commission Cannot Legally Auction Satellite DARS Licenses

Spectrum auctions became part of the Communications Act because they are an excellent method of efficiently assigning licenses where there exists a number of mutually exclusive applications. Auctions are preferable to lotteries and comparative hearings in that competitive bidding assigns licenses more rapidly to entities that place the greatest value on it. Such entities will have the economic incentive to use the spectrum in the most efficient manner possible. Auctions also make assignments more quickly and at lower cost to society than do lotteries and comparative hearings.

However, if there is no mutual exclusivity, auctions are not only unlawful, they are not in the public interest. Under such circumstances, auctions will not make more efficient assignments. Rather, they merely delay the process and add to the start-up costs of new communications services, thereby both threatening the economic viability of new providers and increasing the price consumers must pay for service. Thus, in the absence of mutual exclusivity, spectrum auctions raise money for the federal treasury at the expense of both communications providers and the consumers of the services they offer.

In drafting the competitive bidding legislation now contained in Section 309(j)(1) of the Communications Act,[69] Congress plainly intended that auctions only be used when there were more applications then could be accommodated in the spectrum. By its terms, this

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[69] 47 U.S.C. § 309(j)(1).

section only allows the Commission to auction spectrum for which there exists mutual exclusivity: "If *mutually exclusive applications* are accepted for filing for any initial license . . . then the Commission shall have the authority . . . to grant such license . . . through the use of a system of competitive bidding."[70] Moreover, even where there appear to be more applicants than available slots, Congress directed that rather than immediately auctioning spectrum, the FCC has an obligation to first attempt to "avoid mutual exclusivity in application and licensing proceedings" by through the use of "engineering solutions, *negotiation*, threshold qualifications, service regulations, and other means."[71]

In the case of the satellite DARS spectrum, all incumbent licensees have already negotiated a mutually agreeable means of dividing the 50 MHz of available spectrum. Under this agreement -- embodied in a filing submitted this day, but based on a long-standing plan already on file with the Commission[72] -- each applicant will share one quarter of the 50 MHz band. Plainly, such an agreement precludes as a legal matter FCC jurisdiction to auction this spectrum.

Where, as in this instance, auctions are an inefficient means of resource allocation, the only purpose served is enhancing the federal treasury. But Congress specifically prohibited the agency from proceeding on this ground alone. Section 309(j)(7) states that "[t]he Commission may not base a finding of public interest, convenience, and necessity on

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[70] *Id.* (emphasis added).

[71] 47 U.S.C. § 309(j)(6)(E) (emphasis added); *see also* Omnibus Budget Reconciliation Act of 1993, Budget Committee Report, H.R. Rep. No. 111, 103 Cong., 1st Sess. 258 (1993).

[72] Letter from CD Radio, DSBC and Primosphere to Cecily Holiday (dated Nov. 17, 1993; filed Dec. 6, 1993).

the expectation of federal revenues from the use of a system of competitive bidding." The legislative history of this provision amplifies this admonition: "[t]he Commission is not a collection agency of the U.S. government and should not be influenced by budgetary considerations."[73] Should the FCC attempt to auction this spectrum through options two or three, it will transparently be acting as a "collection agency of the U.S. government."

Finally, implementing auctions here would constitute a radical change in Commission policy without reasoned explanation. Indeed, on at least four prior occasions, the Commission has declined to use auctions to issue licenses where, as here, applicants had filed for licenses prior to July 26, 1993. Consistent with the provisions of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") -- the legislation that gave the FCC the power to use competitive bidding and also the discretion to use other methods of assigning licenses instead[74] -- these decisions rejecting auctions are based on equitable treatment of existing applicants and the administrative costs and delay that would result from use of auctions.

In September 1993, the Commission, relying on the legislative history of its new auction authority, chose to use lotteries rather than auctions to issue licenses for the nine competing IVDS applications that were filed before July 26, 1993.[75] Likewise, in the

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[73] 47 U.S.C. § 309(j)(6)(E); Omnibus Budget Reconciliation Act of 1993, Budget Committee Report, H.R. Rep. No. 111, 103 Cong., 1st Sess. 258 (1993).

[74] *See* 47 U.S.C. §§ 309(i) & (j); Budget Act, Pub. L. No. 103-66, § 6002(e) (Special Rule), 107 Stat. 312, 397 (1993).

[75] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 8 F.C.C. Rcd 7635, 7659 (1993). In the Conference Report to the Budget Act, Congress referenced pre-July 26th applicants in the IVDS service as examples of applicants for whom the FCC would be allowed to use lotteries. *See* H.R. Rep. No. 213, 103d Cong.,

Cellular Unserved Areas Order, the Commission used lotteries rather than auctions to award licenses for cellular unserved areas among competing applicants who filed for licenses prior to July 26, 1993.[76] In exercising its statutorily conferred discretion to choose lotteries, the Commission noted that the legislative history of the Budget Act "demonstrates that Congress recognized the equities involved in the auction law's grandfathering provisions for applicants on file with the Commission before July 26, 1993."[77] The FCC reasoned that

> whatever concerns Congress had about the possibility of speculative applications in particular services, Congress ultimately decided that other factors, including considerations of equity and administrative cost and efficiency, justified the use of lotteries for those applicants who, in reliance on the Commission's existing lottery procedures, had filed applications prior to July 26th.[78]

In justifying its decision to avoid auctions, the Commission stated that many of the cellular unserved areas applications have been on file for more than a year and that the applicants' business plans did not take into account the additional expenses that would be incurred obtaining licenses through competitive bidding.[79] The *Order* further noted that the use of auctions would *not* expedite service to the public -- "a principal objective of the

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1st Sess. 498-99 (1993) (Conference Report).

[76] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 F.C.C. Rcd 7387, 7390-92 (1994) ("*Cellular Unserved Areas Order*").

[77] *Id.* at 7391 ; *see also* H.R. Rep. No. 213 at 498.

[78] *Cellular Unserved Areas Order* at 7391.

[79] *Id.*

auction law"[80] -- but, that the licenses could be issued almost immediately through lotteries, and service would soon begin. Notably, the Commission's decision to refrain from auctions also was based on its prior precedent: "we believe that using auctions for the cellular unserved area applications would be inconsistent with the Commission's decision to use lotteries for IVDS applications that were filed prior to July 26, 1993."[81]

Similarly, in the recent *MDS Order*, the Commission used lotteries rather than auctions to issue MDS station licenses to competing applicants who filed prior to July 26, 1993.[82] In doing so, the Commission used the same analysis, noting first that most of the MDS applications had been on file for over four years, and that it would be unfair to require these applicants to refile their applications and participate in auctions because they submitted their applications with the expectation of participating in a lottery.[83] In addition, the FCC stated that while lotteries would require no further submissions from the applicants and could be conducted immediately, auctions would obligate applicants to file new information required under the competitive bidding rules and would probably cause other administrative

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[80] *Id.* at 7392.

[81] *Id.*

[82] Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and the Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, MM Docket No. 94-131; PP Docket No. 93-253, ¶¶ 87-95 (June 30, 1995) ("*MDS Order*").

[83] *Id.*, ¶ 89.

and judicial delays as applicants sought reconsideration of the decision and challenged inequitable use of auctions in court.[84]

The *MDS Order* also clarified the Commission's analytical approach to exercising its discretion to refrain from auctions. The *Order* states that "we continue to believe the proper approach is to balance the advantages and disadvantages of lotteries and auctions to determine which best serves the public interest on the facts before us."[85] In deciding whether to apply new auction rules to pending applicants, the Commission resolved to balance the "ill effect" of the new rule on the pending applicants with the "mischief of frustrating the interests the rule promotes."[86] The *Order* concluded that the ill effects of subjecting the existing applicants to auctions substantially outweighed any potential mischief that may be caused to the development of MDS.[87]

Finally, in its *Report and Order* adopting service rules for Big LEOs,[88] the Commission, consistent with its duty under 47 U.S.C. § 309(j)(6)(E), insisted that the incumbent licensees negotiate a "sharing plan" to avoid mutual exclusivity prior to the application cut-off.[89] The *Report and Order* further provided that if, and only if, such an

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[84] *Id.*, ¶ 90.

[85] *Id.*, ¶ 95.

[86] *Id.* (citing Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987)).

[87] *Id.*

[88] Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 F.C.C. Rcd 5936 (1994).

[89] *Id.* at 5963.

agreement could not be negotiated, the FCC would have to choose from among "comparative hearing, lottery, and auction" options as a means of assigning licenses.[90] Here, the agency actually considers the reverse: using auctions despite the fact that the applicants have negotiated a sharing plan and eliminated mutual exclusivity.[91] As with its prior decisions rejecting auctions, it is questionable whether the FCC could provide a principled basis for such a changed policy.

Applying this same analysis here, it is plain that competitive bidding is inappropriate, inequitable, and unlawful. With the exception of their mutual exclusivity, the applicants and equities in the above cases are indistinguishable from the satellite DARS applicants and equities. Like the above applicants, the satellite DARS applicants filed their applications prior to July 26, 1993. Indeed, CD Radio's application has languished before the Commission for over five years -- a period of regulatory limbo greater than any faced by the applicants above.[92]

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[90] *Id.*

[91] *NPRM*, ¶ 36. Notably, FCC International Bureau Chief Scott Harris recently stated that "[w]here mutual exclusivity can be avoided through a negotiated rulemaking and all parties can be satisfied, there's no need for an auction." Mutual Exclusivity Remains the Deciding Factor, *Mobile Satellite News*, Sept. 7, 1995 at 2.

[92] In a separate statement to the Commission's recent proposal to speed licenses for 220 MHz service and allow licensees greater service flexibility, FCC Commissioner James H. Quello voiced strong opposition to the use of auctions for this very reason. Commissioner Quello stated

> I do not think . . . that the worthy goal of licensing by auction should be at the expense of long-standing applicants that have been subjected to administrative delay and indecision through no fault of their own. It is this Commission that created the regulatory limbo of pending applications. It seems to me the height of bureaucratic inequity that this Commission would not only impose on this handful of applicants the costs of a four-year delay in

Moreover, as with the prior cases, a mid-stream switch to auctions would result in a substantial delay of service to the public as the application cycle is repeated and existing applicants treated inequitably seek to vindicate their rights before the Commission and in court. In contrast, issuance of licenses to the existing applicants could be accomplished immediately, resulting in the faster commencement of satellite DARS to the public.[93] In sum, the ill effects of auctions on existing applicants would be grave, while a fundamental goal of the competitive bidding rules -- speeding service to the public -- would be foiled rather than advanced by auctions.

For these reasons, the Commission would be hard pressed to justify through "reasoned analysis" auctions for existing satellite DARS applicants.[94] The agency's prior

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> processing their applications, but then increase these costs by requiring them to bid at auction because of the delay.

News Release, *FCC Daily Digest*, July 28, 1995, Commission Proposes Plan to Roll Out Wireless Services (Separate Statement of Commissioner James H. Quello).

[93] *See id.* ("One of the considerations enunciated in the Budget Act for this Commission to weigh in exercising the Congressionally granted discretion to determine how to process pending applications is the relative speed of service to the public.").

[94] *See* Greater Boston Television Corp. v. FCC., 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored."); *see also* Achernar Broadcasting Co. v. FCC, 1995 U.S. App. Lexis 22656, *22 (D.C. Cir. Aug. 18, 1995) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.") (quoting Telecommunications Research & Action Ctr. v. FCC, 800 F.2d 1181, 1184 (D.C. Cir. 1986); Mountain States Tel. and Tel. v. FCC, 939 F.2d 1021, 1035 (D.C. Cir. 1991) ("[W]hile an agency is free to alter its past rulings and practices . . . [it] must provide a reasoned explanation for any failure to adhere to its own precedents. . . . That explanation must establish a 'rational connection between the facts found and the choice made,' . . . and must be articulated 'with sufficient clarity or specificity to permit [a court] to engage in meaningful review.'") (internal citations omitted); California v. FCC, 905 F.2d 1217, 1234 (9th Cir. 1990) ("'[A]n agency's view of what is in the public interest may change. . . . But